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No. 07-1370

In the Supreme Court of the United States

LONG JOHN SILVER'S, INC.,

Petitioner,

v.

ERIN COLE, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

Reference is hereby made to the Rule 29.6 Statement in Petitioner's Petition for a Writ of Certiorari filed in this action.

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REPLY BRIEF FOR PETITIONER

Respondents' Opposition to the Petition for a Writ of Certiorari ("Opp.") demonstrates why the Petition should be granted.

As the Petition explains, the Fourth Circuit's decision in this case conflicts with this Court's decisions in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Pet. 14-18. It also exacerbates an already serious circuit split, since the D.C. and Fifth Circuits hold that *McMahon* and *Gilmer* require heightened scrutiny of arbitrators' interpretation and application of federal statutes, while the Fourth, Second and Eleventh Circuits have rejected any suggestion that the courts have a responsibility to ensure that arbitrators correctly interpret and apply federal statutes. Pet. 18-25. Respondents assert that (1) Petitioner did not raise the issue below, (2) the Fourth Circuit's decision is not inconsistent with *McMahon* and *Gilmer*, (3) there is no circuit split on the issue, and (4) the result in this case would be the same even if Petitioner's position were correct.

None of these contentions is accurate. Respondents' arguments do nothing to minimize the significance of the issue presented or the reasons why this Court should decide it.

A. Petitioner Raised The Issue Below.

Respondents claim that Petitioner never raised the issue presented by the Petition in the lower courts. Opp. 7-10. Respondents are incorrect.

In its brief before the Fourth Circuit, Petitioner argued:

> Thus, especially in cases in which statutory rights are at stake, it is not enough that an ***arbitrator analyzed*** a question of law; judicial review of an arbitration award must be thorough enough "'to ensure that arbitrators ***comply*** with the requirements of the statute' at issue." *Gilmer*, 500 U.S. at 32 n.4 (1991) (emphasis added) (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987)); *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 759 (5th Cir. 1999) (recognizing that *Gilmer* requires "judicial scrutiny of arbitration awards under the FAA involving [federal statutory] claims sufficient to ensure that arbitrators comply with the requirements of those * * * statutes").

2006 WL 2726265, at *34. Petitioner made the identical argument in the district court. CA JA 23; *see* CA JA 26.

Petitioner thus raised precisely the issue it presents in the Petition – whether *McMahon* and *Gilmer* require a heightened level of scrutiny of arbitrators' interpretation and application of federal statutes.

B. The Fourth Circuit's Decision Is Inconsistent With *McMahon* And *Gilmer*.

Respondents argue that the Fourth Circuit's decision in this case is consistent with *McMahon* and *Gilmer* because, according to Respondents, those cases do not suggest that the courts should determine whether arbitrators misinterpreted or misapplied federal statutes but merely express satisfaction that a *complete absence* of substantive review is "sufficient to ensure that arbitrators comply with the re-

quirements of the statute." Therefore (Respondents argue), the Fourth Circuit's refusal even to consider whether the arbitrator misinterpreted the FLSA was fully consistent with *McMahon* and *Gilmer*. Respondents also assert that any other conclusion would contravene the Court's decision in *Hall Street Associates L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), emphasizing the limited nature of judicial review of arbitral decisions. Opp. 11-18.

Respondents are incorrect on all grounds. There is no way to reconcile the Fourth Circuit's decision with *McMahon* and *Gilmer*. The language and context of *McMahon* and *Gilmer* do not support Respondents' contention, and this Court's requirement that review be sufficient to ensure arbitral compliance with statutory mandates is fully consistent with the limited nature of judicial review of arbitral awards.

1. Language

The language used by this Court in *McMahon* and *Gilmer* is utterly inconsistent with the standard enunciated by the Fourth Circuit in this case. *McMahon* and *Gilmer* state that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S. at 232; *Gilmer*, 500 U.S. at 32 n.4. By contrast, the Fourth Circuit stated that "a reviewing court is entitled to 'determine only whether the arbitrator did his job – not whether he did it well, correctly, or reasonably.'" Pet. App. 7a.

To say that *McMahon* and *Gilmer* are consistent with the Fourth Circuit's standard is to say that this Court is incapable of expressing itself. If this Court wanted to say that arbitrators' misinterpretation of a

federal statute was essentially uncorrectable, it would hardly have referred to judicial review as "sufficient to ensure that arbitrators comply with the requirements of the statute."

2. Context

The context of the discussions of judicial review in *McMahon* and *Gilmer* – both textual and historical – also contradicts Respondents' assertion that these cases approved a standard of review incapable of vindicating congressionally mandated rights.

McMahon and *Gilmer* view an arbitration agreement as merely a type of forum selection clause, with the parties having the same substantive rights they would have in litigation. 482 U.S. at 229-230; 500 U.S. at 26. That is the context in which the Court provided assurance that judicial review would be "sufficient to ensure" arbitral compliance with the requirements of the statute. In that light, it is impossible that the Court was saying – as Respondents contend – that arbitrators' violation of statutory mandates was essentially uncorrectable.

The historical context also supports this conclusion. Respondents are simply wrong in their assertion that *McMahon* and *Gilmer* implicitly rely on "decades of jurisprudence" (Opp. 12) rejecting substantive review of arbitral decisions. In fact, *McMahon* was the *first case* to approve domestic arbitration of statutory claims. The Court's previous cases involved review of arbitral awards under collective bargaining agreements – situations that the Court recognized were not analogous to arbitration of

statutory claims.[1] As Chief Judge Edwards noted in *Cole*, "[a]rbitration in collective bargaining has . . . a plethora of case law to support it. Arbitration of statutory claims, however, is the proverbial 'new kid on the block' . . . ." 105 F.3d at 1473.

The Court has recognized that arbitration of federal statutory claims implicates unique issues because rights under public laws are involved. Thus, the Court originally held that such claims were not arbitrable at all (Pet. 15), and changed its view in *McMahon* only with the assurance that judicial review would be sufficient to vindicate statutory rights. This assurance was critical, because there was no history of arbitration in this field – the Court was treading new ground, and therefore creating new rules. These new rules necessarily required adequate means for vindicating statutory rights. As Professor Gorman has explained:

> It is one thing when an arbitrator deciding a grievance under a collective agreement makes a foolish error in interpreting or applying the contract terms; it is unlikely that any significant public policy will be impaired and, in any event, the parties are free to at-

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[1] In *United Steel Workers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), the Court noted that arbitrators under collective bargaining agreements apply the "common law of the shop," rather than public law. *Id.* at 579-580. The D.C. Circuit in *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), emphasized the significant differences between the two types of arbitration (*id.* at 1473-1477) and said that reliance upon cases involving collective bargaining arbitration as a template for review of arbitral decisions of claims under federal employment laws is "a mischievous idea, one that we categorically reject" (*id.* at 1473).

> tempt promptly to rectify the error . . . at the next contract renegotiation. When the arbitrator's error relates to statutory interpretation or application, there is legitimate concern that a larger public objective has been frustrated.

Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 669-670 (1995).

Thus, the historical context of *McMahon* and *Gilmer* belies Respondents' claim that the Court was informed by "decades of jurisprudence" – never cited – in purportedly concluding that the complete absence of substantive review was "sufficient to ensure that arbitrators comply with the requirements of the statute." If that were the case, then the Court was making an empty promise when it stated that a party agreeing to arbitrate a statutory claim "does not forgo the substantive rights afforded by the statute." *McMahon*, 482 U.S. at 229.

3. Limited judicial review

Respondents further claim that *McMahon* and *Gilmer* could not have contemplated substantive review of arbitral interpretation and application of federal statutes because that would be inconsistent with the nature of arbitration, which demands limited judicial review. They argue that this Court's recent decision in *Hall Street* emphasizes the limited nature of such review. Opp. 14-18.

Nobody doubts that judicial review of arbitral decisions should be limited. No court has held – and Petitioner does not suggest – that arbitral decisions of statutory claims are subject to plenary review. *McMahon* and *Gilmer* expressly recognize that judi-

cial review "is limited," but nonetheless "sufficient to ensure" arbitral compliance with statutory mandates. Similarly, the D.C. Circuit in *Cole* said only that review should "ensure that arbitrators have properly interpreted and applied statutory law." 105 F.3d at 1487. And the Fifth Circuit in *Williams v. Cigna Financial Advisors Inc.*, 197 F.3d 752 (5th Cir. 1999), held only that review "'must be sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." *Id.* at 761.

Hall Street is not to the contrary. *Hall Street* – which did not involve statutory claims and never cites *Gilmer* or *McMahon* – holds that the Federal Arbitration Act did not permit plenary review of arbitral awards, noting the "need[] to maintain arbitration's essential virtue of resolving disputes straightaway." 128 S. Ct. at 1405. *Hall Street* expresses concern regarding the potential of "open[ing] the door to . . . full-bore legal and evidentiary appeals" (*id.*) and rejects the argument that the FAA allowed "evidentiary and legal review generally" (*id.* at 1404). Since *McMahon* and *Gilmer* do not contemplate plenary review – or anything close to it – they are fully consistent with *Hall Street* and the nature of arbitration.

C. There Is A Clear Circuit Split On The Issue Presented By The Petition.

As the Petition explains, there is a clear circuit split regarding the standard of review applicable to arbitral interpretation and application of federal statutes. The D.C. Circuit and the Fifth Circuit have held that *McMahon* and *Gilmer* require heightened review of arbitral interpretation and application of federal statutes, while the Second, Fourth and Eleventh Circuits have held that the courts have virtu-

ally no ability to correct such critical arbitral errors. Pet. 18-25.

Respondents deny the existence of a "genuine" circuit split, claiming that the D.C. and Fifth Circuits did not really adopt a heightened standard of review for arbitral interpretations and applications of federal statutes. To support this assertion, Respondents cite later cases from these circuits applying a deferential standard of review in cases reviewing arbitral awards under federal statutes. Opp. 20-26. Respondents are patently wrong.

Any fair reading of the D.C. Circuit's decision in *Cole* and the Fifth Circuit's decision in *Williams* demonstrates that both courts expressly adopted a heightened standard of review for arbitral interpretations and applications of federal statutes – both courts said they were doing so, and explained that this heightened standard was required by *McMahon* and *Gilmer*. *Cole*, 105 F.3d at 1487; *Williams*, 197 F.3d at 760-762. Significantly, both *Cole* and *Williams* adopted standards for reviewing arbitral interpretations and applications of federal statutes that permitted vacatur regardless of whether the arbitrators' misapplication of the statute was intentional. 105 F.3d at 1487; 197 F.3d at 761-762. This placed the D.C. and Fifth Circuits in direct conflict with the Second, Fourth and Eleventh Circuits, which require intentional error to justify vacatur. Pet. 19-22. This is no mere "semantic difference" – one standard permits correction of error and the other does not.

Respondents are similarly misguided in asserting that later cases in the D.C. and Fifth Circuits undermined this conflict by applying the normal deferential standard of review to arbitral awards under

federal statutes. Opp. 22-26. In fact, the cases they cite *did not involve challenges to the arbitrators' interpretation or application of the statutes.*[2] Since *Cole* and *Williams* limited heightened review to arbitrators' interpretation and application of the statute, these later cases properly applied the deferential standard of review to challenges on other grounds. Therefore, these later cases do not detract from the circuit split illustrated by *Cole* and *Williams*.

D. Proper Resolution Of The Issue Presented Affects The Result In This Case.

This case provides an ideal vehicle for resolution of the issue presented because the result would be different if the proper standard were applied. Pet. 26-32. Respondents argue that the result would be the same, claiming that (1) the arbitrator's decision was "fact- and document-specific," (2) the FLSA's written consent requirement is merely "procedural," and therefore inapplicable in arbitration, and (3) all of the parties' rights are adequately protected by disregarding the congressionally-mandated written consent requirement. Opp. 28-38. These arguments are erroneous.

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[2] Although the cases cited by Respondents involved federal statutory claims, none of them involved challenges to the arbitrators' interpretation or application of the statute. *See La-Prade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 705-706 (D.C. Cir. 2001) (discretionary imposition of a portion of forum costs on partially successful plaintiff); *Kurke v. Oscar Gruss & Son, Inc.*, 454 F.3d 350, 355 (D.C. Cir. 2006) (rejection of defenses of ratification and failure to mitigate damages); *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 352-356 (5th Cir. 2004) (interpretation of scope of arbitration clause and determination of conflict of interest).

1. The critical questions posed by the petition are not "fact- and document-specific."

Respondents contend that resolution of the issue presented by the Petition would not change the result in this case because the arbitrator based his ruling upon an interpretation of the parties' arbitration agreement and the procedural history of the case. Opp. 28-32. Not so.

The *only* language the arbitrator "interpreted" to reach his desired result was the parties' agreement to arbitrate before the AAA. Based on this agreement to arbitrate, the arbitrator concluded that the AAA class arbitration rules trumped the congressionally-mandated written consent requirement of § 16(b). Pet. App. 31a-35a. That does not make the arbitrator's decision "document-specific," since it would apply to every agreement to arbitrate before the AAA.

Moreover, the arbitrator's reliance upon the "procedural history" of this case also presents a pure issue of law, which would be resolved by the Court's decision. The arbitrator decided that Petitioner's enforcement of an arbitration agreement in a different case[3] made it "equitable" to disregard § 16(b) and

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[3] In *Johnson v. Long John Silver's Restaurants, Inc.*, 320 F. Supp. 2d 656 (M.D. Tenn. 2004), *aff'd* 414 F.3d 583 (6th Cir. 2005), a plaintiff instituted an FLSA collective action against Petitioner. The district court granted Petitioner's motion to compel arbitration, and the Sixth Circuit affirmed. The arbitrator in this case decided that "equity is better served" by certifying an opt-out class because potential plaintiffs might have obtained relief in the *Johnson* case if Petitioner had not successfully compelled arbitration. Pet. App. 36a.

certify an opt-out class. Pet. App. 33a-36a. This issue is not "fact-specific" because the question is not whether the arbitrator's result was "equitable," but whether an arbitrator (or a court) may disregard the unequivocal written consent requirement of § 16(b) whenever it decides that an opt-out class would be more "equitable" than the congressionally-mandated written consent requirement. Neither the arbitrator nor Respondents provide any support for this peculiar notion.

2. It is irrelevant whether the written consent mandate is characterized as "substantive" or "procedural."

Respondents also assert that the written consent requirement of § 16(b) is merely "procedural" and therefore inapplicable in arbitration. Opp. 32-36. This assertion does not argue against certiorari.

The relevant question is not whether the written consent requirement is "procedural" or "substantive," but whether it must be applied in arbitration because it is an integral part of the entire statutory scheme, representing a critical congressional policy choice. Respondents do not address that issue.

Respondents never deny that Congress' decision to adopt the written consent requirement reflected a conscious public policy choice (Pet. 27-30), and constitutes a "crucial policy decision." *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 311 (3d Cir. 2003). Even the Fourth Circuit in this case acknowledged that Congress intended that the written consent requirement would apply in arbitration. Pet. App. 11a. Respondents also do not deny that the written consent requirement is such an integral part of the statutory scheme that it is impossible to apply the

FLSA's statute of limitations without applying the written consent requirement. Pet. 30-31.[4]

Even if the issue is whether the written consent requirement is "procedural" or "substantive," the proper conclusion is that the requirement is substantive for the reasons specified by the Secretary of Labor in her *amicus* brief, *i.e.*, the written consent requirement recognizes an employee's "fundamental right not to be included as a plaintiff" without his or her consent. CA JA 213.

3. Certification of an opt-out class does not "effectively vindicate" the parties' rights.

Respondents' final argument is that the arbitrator's certification of an opt-out class "effectively vindicated" the parties' rights under the written consent mandate of § 16(b), because the arbitrator directed that the class members be given the "best notice practicable under the circumstances." Opp. 36-38. This bizarre contention warrants little response. Obviously, the written consent requirement mandated by Congress – a requirement representing a critical policy choice – is not "effectively vindicated" by an order that completely eliminates that requirement.

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[4] Respondents concede that "there is certainly a connection" between the FLSA statute of limitations and the written consent mandate, but argue that the statute of limitations was tolled in this case. Opp. 35-36. That misses the point. Petitioner's argument is that the written consent requirement is an integral part of the statutory scheme and therefore must be applied in arbitration. That is true whether or not the statute of limitations might be tolled in a particular case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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